SERVED: September 27, 1996

NTSB Order No. EA-4486

UNITED STATES OF AMERICA
**NATIONAL TRANSPORTATION SAFETY BOARD**
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of September, 1996

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| DAVID R. HINSON,<br>Administrator,<br>Federal Aviation Administration,<br><br>Complainant,<br><br>v.<br><br>LLOYD T. HIRAOKA,<br><br>Respondent. | ) | Docket SE-14588 |

**OPINION AND ORDER**

The Administrator has appealed from the oral initial decision and order Administrative Law Judge William R. Mullins rendered in this proceeding on August 20, 1996, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge reversed a July 23, 1996 emergency order of the Administrator

[1]An excerpt from the hearing transcript containing the initial decision is attached.

suspending respondent's airman certificate, with airline transport pilot ("ATP") privileges, pending his successful re-examination of his qualifications to hold that certificate. For the reasons discussed below, the appeal will be granted.[2]

The Administrator's emergency order, which became the complaint once the matter was appealed to the Board, alleged, in pertinent part, the following facts and circumstances concerning the respondent:

> 1. You hold Airman Certificate Number 1571120 with Airline Transport Pilot privileges.
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> 2. On January 11, 1996 you failed to demonstrate satisfactory performance during a Part 135 proficiency and competency flight check administered by Mr. Karl Wahlborg, Check Airman, AVN-260, which included nonprecision instrument approach procedures and landings essential to the performance of your duties as a Flight Inspection pilot.
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> 3. On January 25, 1996, following additional training which included NDB and VOR approaches, you again failed to demonstrate satisfactory performance during a Part 135 proficiency and competency flight check administered by Mr. Phillip Stanley, Check Airman, AVN-260.
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> 4. By letter dated February 13, 1996, you were advised by Mr. Mark Zink, Principal Operations Division, that in the interest of safety, a re-examination by an FAA inspector of your qualifications to retain an Airline Transport Pilot certificate was necessary.
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> 5. You initially made arrangements to take the re-exam on June 6, 1996, in Oklahoma City with FAA Inspector Zink on board the aircraft; however, by letter dated June 4, 1996, you advised your superiors that you declined to submit to the reexamination with Inspector Zink.
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> 6. You were subsequently administered a Part 135 competency and proficiency check on June 6th by Mr. Thomas J. Couch, Check Airman, AVN-260, which you failed to pass because you were not knowledgeable in Part 91 airspace and

[2]The respondent, by counsel, has filed a reply brief opposing the appeal.

flight rules.

7. Sometime during the period June 12-24, 1996, you took and passed the oral portion of the Section 44709 (formerly Section 609) re-examination from FAA Inspector Robert Ylla, but failed to complete the flight check portion of the re-examination.

8. On June 28, 1996, you were administered a Part 135 proficiency and competency check by Mr. Couch for the third time and passed; however, you again refused to have an FAA inspector on board to observe your performance during the flight check.

9. To date, you failed to submit to a Section 44709 re-examination of your qualifications to retain your ATP certificate, specifically as it relates to your competency in nonprecision instrument approach procedures and landings, by or in the presence of, an FAA inspector.

The law judge's reversal of the suspension order is not predicated on any view that the Administrator's witnesses' accounts of subpar performances by respondent during the flights referenced in paragraphs 2 and 3 of the complaint did not raise legitimate concerns over respondent's competency as an airman.[3] Rather, the law judge decided in effect that even though the Administrator had reason to doubt respondent's qualifications, he should not be allowed to re-examine him because the January

[3]The law judge believed, however, that he should not consider evidence the parties submitted on paragraphs 5 through 8, as they involve matters occurring after the Administrator issued his re-examination request (paragraph 4). We think it sufficient to note here that even if the evidence advanced in support of paragraphs 4 through 9 could not properly be considered by the law judge in reviewing the validity of the decision to re-examine the respondent, a question we do not here reach, he could consider it to the extent those paragraphs reveal the basis for the Administrator's decision to suspend respondent's certificate. The suspension decision is a reaction to respondent's refusal to have his competence as an ATP certificate holder retested; it does not reflect a judgment on respondent's competence to hold such a certificate.

flights took place before he could be expected to have regained the proficiency he needed to resume flight responsibilities in connection with his interrupted employment with the FAA. In other words, the law judge's determination that the Administrator's re-examination request was not reasonable does not constitute a conclusion that the Administrator did not have a reasonable basis in fact for questioning respondent's capacity to safely exercise ATP privileges. As such, the law judge's decision ignores precedent and inappropriately and unnecessarily interjects the Board into a labor controversy involving the Administrator and the respondent.

The Board has repeatedly explained that its authority to review the Administrator's exercise of discretion to re-examine a certificate holder is extremely limited. In a recent discussion of our jurisdiction in this area, Administrator v. Santos and Rodriguez, NTSB Order EA-4266 (1994) at 3-4, we stated:

> Our precedent establishes that a Board determination as to the reasonableness of a re-examination request entails an exceptionally narrow inquiry. We do not attempt to secondguess the Administrator as to the actual necessity for another check of a certificate holder's competence. Rather, in a typical case, we look only to see whether the certificate holder has been involved in a matter, such as an aircraft accident or incident, in which a lack of competence could have been a factor and, if he was, we uphold the re-examination request as reasonable, without regard to the likelihood that a lack of competence had actually played a role in the event. See, e.g., Administrator v. Wang, NTSB Order EA-3264 (1991). In sum, the Administrator in such cases need only convince us that a basis for questioning competence has been implicated, not that a lack of competence has been demonstrated.

In this case the law judge, instead of limiting his focus to a review of alleged deficiencies in respondent's piloting of the

January flight checks, undertook, in disregard of evidence he plainly believed supported the allegations, to substitute his judgment for the Administrator's as to whether the respondent should have been subjected to such checks in the first place, in light of certain circumstances related to his employment history with the Administrator, which had led to an extended absence from flying. We turn now to a discussion of the context in which the law judge reached this anomalous decision.

Respondent had been a flight inspection pilot for the FAA for about a dozen years when the agency reclassified the position he occupied but did not continue him in the job as rewritten.[4] Rather than relocate to accept a nonflying position, the respondent retired, but filed a grievance with the Federal Labor Relations Authority ("FLRA"). The FLRA subsequently determined that the respondent should have been selected for employment in the reclassified pilot position. Although respondent went back to work in August 1995 and obtained some flight and other training, he did not make himself available to qualify to return to flight status with the FAA until January 1996 because he elected to take more than two months in accumulated leave rather than lose it. When respondent took the check flight referenced in paragraph 2 of the complaint, he had apparently been out of the Beech BE-300F cockpit for some 21 months, a period of time that witnesses for both parties acknowledge would likely result

[4]FAA flight inspection pilots utilize an FAA fleet of some 20 aircraft to ensure that aviation navigation aids around the country are working properly.

in some erosion of piloting skills at the ATP level.

In concluding that the Administrator's re-examination request was unreasonable, the law judge did not, as alluded to supra, determine that there was no reasonable basis in fact for finding that respondent's unsatisfactory to marginal performance on some items during two flight checks was, or might have been, attributable to a lack of piloting competence. Instead, he found persuasive the respondent's arguments that the Administrator had not, contrary to his own policies and obligations imposed on him by the FLRA, done enough, prior to evaluating respondent's readiness to resume flight duties, to train respondent so that he would have, or be brought back up to, the level of proficiency necessary to perform the position the labor dispute had established he was entitled to occupy. Aside from the fact that we do not necessarily share the law judge's analysis of the parties' differing perspectives on what the Administrator had to do to comply with the FLRA's ruling or whether he had appropriately discharged whatever re-employment obligations he may have incurred respecting the respondent,[5] it is clear that the law judge based his decision on matters that he should have recognized were beyond the scope of his authority to address and plainly extraneous to the air safety interests that a proper

[5]Our reading of the record leads us to concur in the law judge's assessment that, contrary to respondent's suspicions, the flight checks he was given did not "indicate that anyone [at the FAA] was out to get [him] or that [he was] being targeted" (I.D. at tr. p. 433).

resolution of a re-examination issue should exclusively embrace.[6]

We intimate no view on whether the timing of the Administrator's flight checks was consistent with the corrective, restorative action the FLRA contemplated the Administrator should take.[7] For with all due respect to the law judge's opinion that the Administrator was too precipitous in testing the respondent's flight skills after a layoff, the evidence he credited is sufficient to justify a conclusion that a lack of competence either was or may have been the cause of his unsatisfactory showing on the January flight checks. The law judge should have looked no further.

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[6]The Administrator also objects to the law judge's assertion that the re-examination request in this matter presents no issue of safety because respondent is not yet being allowed to fly for the Administrator. We agree that the law judge's reasoning in this connection is wide of the precedential mark. We long ago rejected the argument that non-use of a certificate mooted a re-examination request, even in the face of the airman's assurances that he would not use his ATP certificate. See Administrator v. Bradford, 3 NTSB 336, 337 (1977)("As long as he retains his certificate, he has the indicia necessary to allow him to act as an ATP-rated pilot."). That respondent needs his ATP certificate to fly for the Administrator does not mean that he is not free to utilize his certificate for purposes unrelated to his employment, where the question of his unre-examined competence to hold it clearly implicates safety concerns.

[7]At the same time, we perceive no basis for concluding either that the FLRA expected the Administrator to return the respondent to flight status before he had demonstrated the necessary level of proficiency or that the Administrator was in any way foreclosed by the FLRA rulings, while respondent underwent whatever retraining was needed, from assessing his progress along the way and taking whatever interim steps might be required to ensure that his certificate accurately reflected his flying ability.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;

2. The initial decision is reversed; and

3. The Administrator's emergency order of suspension is affirmed.

FRANCIS, Vice Chairman, HAMMERSCHMIDT and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, did not concur; dissent to follow. HALL, Chairman, not participate.

John J. Goglia, Member, Dissenting:

I agree with the Administrative Law Judge that the FAA did not act reasonably here. No emergency revocation order should have been issued, because there was no emergency. Had the FAA's counsel adhered to its own rules and procedures, this should have been evident.

The Administrator's actions in this case demonstrate the need for revising the FAA's use of its emergency powers. Although the majority relies on the lack of jurisdiction to review collateral challenges? Morton v. Dow, 525 F. 2d 1302 (10th Cir. 1975), there is nevertheless an obligation for the FAA to act fairly. Whenever the FAA invokes its emergency powers, the Respondent should consider requesting a stay from a Court of Appeals, see e.g., Excalibur Aviation, Inc. v. FAA, 104F. 3d 1058 (per curiam) (8th Cir. 1997) No. 96-2169 (January 15, 1997); Green v. Brantey, 981 F. 2d 514 (11th Cir. 1993); Gaunce v. deVincentis, 708 F 2d 1290 (7th Cir.) (per curiam), cert. denied, 464 U.S. 978 (1983). Alternatively the Respondent should consider seeking a restraining order from a District Court, Mace v. Skinner, 34 F.3d 854 (9th Cir. 1994), citing McNary v. Haitian Refugee Center. Inc., 498 U.S. 479 (1991). Unfortunately, even with expedited reviews in the Courts of Appeals, a certificate holder may have to wait so long that the issue will become moot. More needs to be done to correct the over use by the FAA of its emergency revocation authority.

August 20, 1998